

1 WO
2
3
4
5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8
9 United States of America,) CR 92-113-PHX-FJM
10 Plaintiff,)
11 vs.)
12 Martel Alvarez Chavez,)
13 Defendant.)
14 _____)
15

ORDER

16 The court has before it Chavez' "Petition for a Writ *Audita Querela*" (doc. 304), the
17 governments "Response", and Chavez' "Reply."

18 Chavez seeks relief under a writ of *audita querela* from his life sentence. He argues
19 that his sentence was based upon mandatory Guidelines held unconstitutional in *United*
20 *States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). The United States argues that *Booker*
21 is not retroactive and that there are no extraordinary circumstances in this case within the
22 meaning of *Carrington v. United States*, 503 F.3d 888, 893 (9th Cir. 2007).

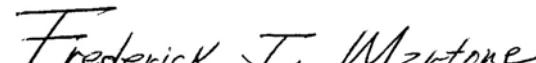
23 It seems plain that under *Carrington*, Chavez is "not entitled to relief on collateral
24 review, however it is labeled." 503 F.3d at 890. This is so because a writ of *audita querela*
25 is not available where a claim would be cognizable in a § 2255 habeas petition. The limits
26 on habeas petitions "do not create a 'gap' in the post-conviction landscape." *Id.* The court
27 also noted that, of course, *Booker* does not apply to cases on collateral review. And while
28

1 the court alluded to the possibility that there might be relief available "in a particular case
2 upon a showing of truly extraordinary circumstances and equities." *Id.* at 893, Chavez makes
3 no such case here.

4 Moreover, and perhaps more importantly, the premise upon which Chavez' petition
5 is based is incorrect. His argument is based upon mandatory Guideline application. But the
6 life sentence in this case was mandatory under 21 U.S.C. § 841 and thus the mandatory
7 statutory sentence replaced the Guideline in his case. The Guidelines, even when mandatory,
8 were always subordinate to the statute.

9 Accordingly, IT IS ORDERED DENYING Chavez' "Petition for a Writ of *Audita*
10 *Querela*" (doc. 304).

11 DATED this 3rd day of September, 2008.
12
13

14 
15 Frederick J. Martone

16 United States District Judge
17
18
19
20
21
22
23
24
25
26
27
28